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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LAWRENCE BANKS et al.,

Plaintiffs and Respondents,

v.

DIANNA MOULTON-CURRY,

Defendant and Appellant.

B236955

(Los Angeles County
Super. Ct. No. BP121243)

APPEAL from an order of the Superior Court of Los Angeles County, Reva G. Goetz, Judge. Affirmed.

Blank Rome, Gregory M. Bordo, and Angela Y. Shin for Defendant and Appellant.

Law Office of Joseph R. Brown and Joseph R. Brown for Plaintiffs and Respondents.

* * * * *

Appellant Dianna Moulton-Curry (Moulton-Curry) appeals from the probate court's denial of her petition requesting declaratory relief under former Probate Code section 21320.¹ (Repealed by Stats. 2008, ch. 174, §§ 1-2, eff. Jan. 1, 2010.) We affirm the probate court's denial.

FACTUAL BACKGROUND

A. Family Tree

Moulton-Curry is the daughter of Failton Moulton (Failton) and Doris Moulton (Doris). Prior to his marriage to Doris, Failton had a child from a prior marriage, respondent Alfredia Jasper (Jasper). Prior to her marriage to Failton, Doris had a child from a previous marriage, respondent Lawrence Banks (Banks).

In addition, Failton and Doris had a son together, Steven Moulton (Moulton). Moulton is not a party to this lawsuit. Failton also had a daughter from his previous marriage, Jennifer Anthony, who died prior to any events relevant to this litigation.

B. The Will

Moulton-Curry, Jasper, Banks, and Moulton are all beneficiaries of a document that purports to be the August 12, 1998 joint will of Failton and Doris. The major assets disposed of by this document are four parcels of real property, which according to the terms of the document, are left to the beneficiaries in equal shares. The document allows the beneficiaries to purchase shares in the property from each other to effect equal distribution or, if no such agreements are reached, directs the sale of the properties and equal distribution of the proceeds.

The alleged will also contains a clause prohibiting the surviving spouse from unilaterally changing the disposition of the properties described therein. It also contains what appears to be a "no contest" clause which disinherits any beneficiary who challenges the will.

¹ All statutory references are to the Probate Code unless otherwise designated.

C. The Trust

Failton died on December 24, 2000, predeceasing Doris. Thereafter, on December 15, 2003, Doris created the Doris Moulton Revocable Trust. The trust agreement names Doris and Moulton-Curry as trustees, and Moulton-Curry, Jasper, Banks, and Moulton as beneficiaries. The parties agree that the major assets controlled by the trust are the same four properties described in the alleged joint will. The trust agreement originally provided for equal distribution of the trust assets into descendant's trusts for each beneficiary upon Doris's death.

On February 7, 2007, Doris and Moulton-Curry executed an amendment to the trust agreement. The amendment excludes Jasper altogether as a beneficiary. The specifics are not important to this opinion, but the amendment also alters disposition of the subject properties in other ways that are arguably at odds with the will. Subsequent to this amendment, Doris and Moulton-Curry transferred or sold some of the subject properties, again in a manner arguably at odds with the terms in the will.

On August 24, 2009, Doris died. The document that purports to be the will was discovered some time after her death, under circumstances disputed by the parties to this litigation.

PROCEDURAL BACKGROUND

A. The Civil Action

On August 6, 2010, Jasper and Banks filed related civil action No. SC109087 and alleged four causes of action: (1) for breach of contract not to revoke a will and for imposition of a constructive trust (§ 21700; *Ludwicki v. Guerin* (1961) 57 Cal.2d 127, 130); (2) for injunctive relief preventing Moulton-Curry from further disposing of any assets of the trust and for an accounting of all assets referenced in the will; (3) for damages based upon nonproduction of the will (§ 8200, subd. (b)); and (4) for double damages for wrongful disposition of an estate's property (§ 859). This action is currently pending.

B. The Probate Petition

Pursuant to section 850, Jasper and Banks filed the petition underlying this appeal, superior court case No. BP121243, on August 20, 2010. The petition alleges essentially the same four claims as the civil action, but in addition seeks an order compelling Moulton-Curry to produce the original of the will. On November 3, 2010, Moulton-Curry filed her response to the petition.

On June 3, 2011, Moulton-Curry filed a request for declaratory relief pursuant to former section 21320. The request sought a declaration that “any action” taken against the will by Moulton-Curry in her capacity as *trustee* of the Doris Moulton Revocable Trust would not violate the will’s no contest clause insofar as she was a *beneficiary* of the will.

On October 6, 2011, the probate court denied her request on two grounds: (1) the request was untimely because Moulton-Curry’s previously filed response to the petition had already contested the will’s validity; and (2) the request, insofar as it sought a declaration that “any action” taken against the will would not violate the no contest clause, was overbroad.

Moulton-Curry filed a timely notice of appeal from the probate court’s decision.²

DISCUSSION

Moulton-Curry made her request for declaratory relief pursuant to former section 21320, subdivision (a), which provided:

“If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of the no contest clause.” (Stats. 1990, ch. 79, § 14.)

As part of its overhaul of the portion of the Probate Code that addresses “no contest” clauses, the Legislature repealed section 21320, effective January 1, 2010. (Stats. 2008,

² Jasper and Banks filed a motion to dismiss the appeal as frivolous and a request for sanctions, both of which were deferred to this panel. Although we affirm the probate court’s order, we herewith deny both the motion to dismiss and the request for sanctions.

ch. 174, §§ 1-2; *Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1615.) The law that replaced section 21320 does not provide for the declaratory relief previously allowed by section 21320. (14 Witkin & Epstein, Summary of Cal. Law (2012 supp.) Probate, § 562, p. 83; see generally, Prob. Code, § 21310 et seq.)

The parties spend a great deal of time arguing, in light of the repeal, what law applies to the purported will of Failton and Doris: former section 21320, its statutory replacement, or the common law. For purposes of this appeal, we need not resolve the complicated issues raised by these arguments. Without so deciding, we assume, for purposes of this proceeding only, that former section 21320 applies. Nevertheless, we affirm the probate court’s denial of relief under that section on the ground of overbreadth. Former section 21320 permits a beneficiary to seek declaratory relief “whether a *particular* motion, petition, or other act” would violate a will’s no contest clause. Moulton-Curry sought a declaration that “*any* action” taken by her as trustee would not violate the no contest clause insofar as she was a beneficiary of the will. Regardless of the distinction Moulton-Curry attempts based upon her legal status as trustee versus her legal status as beneficiary, the request remains overbroad given the plain words of the statute.

DISPOSITION

The probate court’s order is affirmed. Respondents are awarded costs on appeal.

SORTINO, J.*

We concur:

RUBIN, Acting P. J.

GRIMES, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.